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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

WAYNE CARTER,

Plaintiff and Appellant,

v.

IRES COMPANY et al.,

Defendants and Respondents.

G040466

(Super. Ct. No. 06CC12258)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Jamoa A. Moberly, Judge. Reversed.

Bruce G. Schweitzer for Plaintiff and Appellant.

James E. Toothman & Associates, James E. Toothman, Joel F. Donahoe and Erica B. Lillund for Defendants and Respondents.

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Plaintiff Wayne Carter appeals from a judgment following the trial court's determination that his action was barred by the doctrine of res judicata. Plaintiff had previously obtained judgment in a breach of contract action against sellers of a house who reneged on the sale and sold the house to a third party. In the present action, plaintiff sued defendants IRES Company and Ryan Marshall, who represented the third party in the latter transaction. For reasons explained below, we hold that the res judicata does not bar the present action and we therefore reverse the judgment.

## FACTS

Plaintiff previously sued David Hanshaw and Susan Hukill for breach of contract, Orange County Superior Court Case No. 05CC02139, based on those defendants' failure to complete a contract to sell a house to him and selling it to a third party instead. In 2006, the trial court entered judgment in favor of plaintiff and against Hanshaw and Hukill in the total sum of \$45,000 (\$44,000 plus an order to release \$1,000 to plaintiff from an escrow account). The court based the breach of contract damages on the difference between the selling price and the market value of the house.

Thereafter, plaintiff sued defendants for intentional interference with an existing contract and related causes of action. In the present action, the court took judicial notice of the earlier judgment and held "that the subject action . . . is barred by the doctrine of res judicata. *Thibodeau v. Crum* (1992) 4 Cal.App.4th 749. This action arises from the same contract that the court found was breached in Case No. 05CC02139 and for which the court awarded damages to the plaintiff as against the sellers of the subject property in the sum of \$44,000 [*sic*]. Now the plaintiff seeks to recover damages for intentional interference with performance of the same contract. The plaintiff is seeking to recover damages for breach of the contract as against the defendants as brokers for the sellers and prospective buyers of the property. The plaintiff should have brought

this claim in the original action against the sellers, Case No. 05CC02139. A party cannot by negligence or design withhold issues and litigate them in consecutive actions as here. Thibodeau, at page 755. Plaintiff should have joined the defendants here in the prior action and should have brought this claim for intentional interference with the subject purchase transaction in the prior action.” Judgment was entered for defendants.

## DISCUSSION

“[R]es judicata precludes parties . . . from relitigating an issue that has been finally determined by a court of competent jurisdiction. . . .” (*Whittlesey v. Aiello* (2002) 104 Cal.App.4th 1221, 1226.) We review applicability of the doctrine de novo. (*Smith v. ExxonMobil Oil Corp.* (2007) 153 Cal.App.4th 1407, 1415.)

There are three elements to a res judicata defense: (1) The issue decided in the prior case is identical to the one in the present action; (2) there was a final judgment on the merits of that issue; and (3) the party against whom the doctrine is asserted was a party to or in privity with a party to the prior case. (*Whittlesey v. Aiello, supra*, 104 Cal.App.4th at p. 1226.) Thus, if the issues decided in Case No. 05CC02139 were not identical to the issues herein, the doctrine does not apply.

The issues in the two cases are different. In the earlier case the questions were whether the defendants therein breached the contract and the benefit of the bargain plaintiff lost as a result of that breach. The issues here are whether defendants committed the tort of intentional interference with contract and if so, what damages, including potential punitive damages, resulted from that tort. To the extent plaintiff lost the benefit of his bargain, there is an overlap and, assuming the earlier judgment was satisfied, he has been made whole with respect to these damages. But additional damages potentially recoverable in the tort action do not duplicate damages obtained in the earlier action.

In *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7

Cal.4th 503, our Supreme Court held that a party to the contract could not be liable for interfering with its own contract. (*Id.* at p. 521.) In reaching its decision, the court drew a sharp distinction between breach of contract and the tort of interference. The court stated: “Contract and tort are different branches of law. Contract law exists to enforce legally binding agreements between parties; tort law is designed to vindicate social policy. [Citation.]” (*Id.* at pp. 514-515.) And, “[t]he differences between contract and tort give rise to distinctions in assessing damages and in evaluating underlying motives for particular courses of conduct. Contract damages seek to approximate the agreed-upon performance. . . . [¶] Contract damages are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectations of the parties are not recoverable. [Citations.]” (*Id.* at p. 515.)

The court then continues, “tort damages are awarded to compensate the victim for injury suffered. [Citation.] ‘For the breach of an obligation not arising from contract, the measure of damages . . . is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.’ [Citation.]” (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, *supra*, 7 Cal.4th at p. 516.) The court notes that punitive damages are available only “‘for breach of an obligation *not* arising from contract. [Citation.]” (*Ibid.*)

As we noted, the trial court based its decision on *Thibodeau v. Crum*, *supra*, 4 Cal.App.4th 749. Defendants also rely on this case. There, homeowners successfully arbitrated a dispute with their general contractor alleging a variety of construction defects. After the general contractor declared bankruptcy, the homeowners sued the subcontractor who built their driveway, seeking to recover for cracks in it. The Court of Appeal held that, even if these cracks were not encompassed within the arbitrated matter, they should have been because they started to appear immediately after

completion of the driveway (*id.* at p. 756) and concluded that “[t]here were no successive breaches of obligations owed the Thibodeaus, no separate and distinct torts, and no new rights accrued after the first proceeding. The arbitration, mandated by the . . . construction agreement, was intended to settle all existing claims between the Thibodeaus and their general contractor and subcontractors regarding the Thibodeau project.” (*Id.* at p. 758.) The court concluded the new suit was barred by res judicata. (*Id.* at p. 752.)

This case differs from *Thibodeau*, which was based on the absence of “separate and distinct torts.” As we have already noted, the present case involves on the one hand, a breach of contract, litigated in the earlier suit, and on the other, the tort of intentional interference with contract sought to be litigated here. Therefore, it was error to rely on *Thibodeau*.

Instead *Duff v. Engelberg* (1965) 237 Cal.App.2d 505, on which plaintiff primarily relies, governs. *Duff* clearly delineates the difference in the damages that may be recovered from a seller and a third party guilty of interference with the contract. The issue there was “whether a vendee under an executory contract to purchase real property can recover in addition to specific performance of said contract along with consequential and incidental relief damages, both compensatory and exemplary, against a third party who induced the vendor not to go forward with the sale.” (*Id.* at p. 506.) The court answered the query in the affirmative. (*Ibid.*)

In analyzing the issue, the court quoted from Prosser on Torts, “it is now agreed that the fact that there is an available action against the party who breaks the contract is no defense to the one who induces the breach, since the two are joint wrongdoers, and each is liable for the loss. Even a judgment in such an action, returned unsatisfied, is no defense. Where substantial loss has occurred, one line of cases tends to adopt the contract measure of damages, limiting recovery to those damages which were within the contemplation of the parties when the original contract was made. Another, apparently somewhat more uncertain of its ground, has applied a tort measure, but has

limited the damages to those which are sufficiently “proximate,” with some analogy to the rules as to negligent torts. A third, perhaps the most numerous, has treated the tort as an intentional one, and has allowed recovery for unforeseen expenses, as well as for mental suffering, damage to reputation, and punitive damages, by analogy to the cases of intentional injury to person or property. *In the light of the intent and the lack of justification necessary to the tort, this seems the most consistent result.* [Citations.] (Italics added.) (Prosser, Torts (3d ed.) ch. 26, § 123, pp. 972-973.)” (*Duff v. Engelberg*, *supra*, 237 Cal.App.2d at p. 508.) The court then added, “[w]e accept the rule last stated as being the proper one for the reasons quoted in italics.” (*Ibid.*)

Contrary to respondent’s contention, the opinion in *Duff* does not explicitly indicate whether plaintiff filed a separate action against the third parties who interfered with the contract after obtaining judgment against the seller of the property. But considering the caption of the case it is reasonable to assume that these were successive actions. And Witkin describes the *Duff* case as follows: “plaintiffs contracted to buy a lot from vendors M. Defendant neighbors E and C induced vendors M to repudiate the contract and convey to C as trustee. Plaintiffs first sued vendors M in contract, and received a decree of specific performance with incidental damages for wrongful withholding of the land. Then they sued defendants E and C in tort. In this action, the broader tort measure of damages (covering unexpected loss) was available [citation], and recovery of compensatory and punitive damages was upheld.” (5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 741, p. 1069.) In any event, *Duff* does not suggest that its outcome depends upon whether plaintiff sues both the party breaching the contract and the party inducing the breach in the same action. Considering the differences between the breach of contract and tort causes of action noted above, this is not determinative.

DISPOSITION

The judgment is reversed. Appellant shall recover his costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.